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IN THE

Supreme Court of the United States

October Term, 1970

70-17

No. 304

THOMAS S. EISENSTADT, as he is Sheriff of Suffolk County, Massachusetts,

Appellant,

v.

WILLIAM R. BAIRD,

Appellee.

On Appeal from the United States Court of Appeals for the First Circuit

BRIEF OF THE PLANNED PARENTHOOD FEDERATION OF AMERICA, INC., AS *AMICUS CURIAE*

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BRIEF OF THE PLANNED PARENTHOOD FEDERATION OF AMERICA, INC., AS *AMICUS CURIAE*

Statement of Interest of *Amicus Curiae*

This brief is submitted on behalf of Planned Parenthood Federation of America, Inc., also known as Planned Parenthood World Population, with the consent, filed with this Court, of both parties.

Planned Parenthood Federation of America, Inc. (hereinafter called "Planned Parenthood") is a membership corporation originally organized in 1922 and existing under the laws of the State of New York. Its headquarters are in New York City. As of May, 1971, Planned Parenthood had 190 affiliates in 42 states and the District of Columbia operating approximately 700 family planning clinics offering services to the public. It is the leading national voluntary public health organization in the field of family planning and birth control. It is also a leading national organization in the field of educating the public concerning the danger to the United States and the world inherent in the continuing population growth.

The purposes of Planned Parenthood, among others, as stated in its presently effective Certificate of Incorporation include:

> "To undertake, support and promote investigation and scientific research touching upon and embracing the sociological, biological, medical and economic aspects of marriage, procreation, maternal health and family betterment, and to collect, circulate, evaluate and disseminate information concerning said subjects of investigation and scientific research and matters related thereto."

Article II of the Planned Parenthood By-Laws further states:

> "The purpose of the Federation shall be * * *
>
> (a) to provide leadership
>
> —in making effective means of voluntary fertility control, including contraception, abortion and sterilization *available and fully accessible to all* * * *" (emphasis supplied).

Planned Parenthood has adopted a policy statement pursuant to its purposes and binding on its affiliates, which states in pertinent part:

"1. *Everyone has the right to information on birth control, and access to family planning guidance and services.*

2. While all people should recognize the great responsibility they assume when they become parents, no one should be forced to use contraception or undergo sterilization or abortion. We must be especially vigilant to preserve freedom of choice about family size for those who are dependent on public or voluntary agencies * * *" (emphasis supplied).

Thus, Planned Parenthood is firmly committed to the principle that effective means of controlling fertility should be made available and be fully accessible to all persons who wish to use such means on a voluntary basis.

Planned Parenthood is the United States member of the International Planned Parenthood Federation, the leading international organization in the field of family planning and birth control and population education. The International Federation links national organizations for medical research and services in conception control in 70 member countries, cooperates with the United States and other governments, and is an accredited non-governmental agency to the United Nations Economic and Social Council. Planned Parenthood and its affiliates have tax exemption under §501(c)(3) of the United States International Revenue Code of 1954 as amended.

Through the national office and a number of committees, Planned Parenthood offers its affiliates, among other serv-

ices, guidance in the areas of medically directed child spacing by all methods of birth control, treatment of infertility problems and education for marriage and parenthood. Each of the affiliates functions under strict medical standards promulgated by the National Medical Advisory Committee in conjunction with the local medical advisory committees, all such committees consisting exclusively of physicians. Another division of the Federation is the Center for Family Planning Program Development. The Center is the technical assistance division of Planned Parenthood. It provides direct help to all types of agencies, public and private, in the family planning field in developing effective family planning programs.

Many of Planned Parenthood's affiliates operate in cooperation with local public health facilities. The affiliates are also teaching and training centers for physicians, nurses, teachers and social workers and provide for referral services to qualified medical specialists.

Planned Parenthood also operates as a clearing house for information and services relating to conception control. It formulates nation-wide medical and clinical standards and acts as an agency for public and professional education in this field. Its medical director and other consultants confer with medical school faculties and local committees in relation to teaching techniques, formation of clinics and the like.

Planned Parenthood encourages research by scientists in leading universities and laboratories and guides and assists in the clinical testing of contraceptive and birth control methods. It organizes conferences of experts in the

natural and social sciences and it collates information and research and fosters publication of articles in scientific journals.

The need for the provision of fertility control services including contraception without regard to marital status or age has been widely recognized by physicians, social workers, government administrators and others who deal continually with situations in which unwanted out-of-wedlock pregnancies have occurred. Although Massachusetts and Wisconsin are unique in proscribing contraceptive services for the unmarried, the importance of this case to Planned Parenthood and to individuals and organizations throughout the entire country cannot be underestimated, since these laws strike at the basis of Planned Parenthood's purpose and program to make voluntary parenthood possible for all. Whether or not one agrees with the Planned Parenthood tenets concerning the dangers of population growth, the need for the services promoted and supplied by Planned Parenthood in the United States and throughout the world today is, of course, overwhelming. Planned Parenthood thus files the attached brief in its capacity as the leading national health agency in the field of birth control, and as the United States affiliate of the international agency in the field of world-wide population problems.

The ruling by the Court of Appeals which Planned Parenthood supports but from which the Commonwealth of Massachusetts has appealed establishes that birth control services can and should be available to all residents of Massachusetts irrespective of marital status and that the statute limiting the distribution of contraceptives to mar-

ried persons and requiring a doctor's prescription even for non-prescription contraceptives unconstitutionally interferes with the fundamental rights of the people of Massachusetts. We believe that the Court of Appeals' decision is correct and that all Americans have the right to access to medically safe and effective family planning free of arbitrary and unreasonable state prohibitions.

ARGUMENT

POINT I

The prohibition in the Massachusetts statute against rendering medical services in the field of contraception to unmarried persons regardless of their need or situation violates the Fourth, Fifth, Ninth and Fourteenth Amendments to the Constitution of the United States.

This law (MASS. GEN. LAWS, Ch. 272, §§21, 21 A.) prevents physicians from prescribing articles to prevent conception for unmarried persons and interferes directly and substantially with constitutionally protected rights of privacy.

Amicus contends that the right of access to medical services for contraception is a fundamental right. Equally important, *Amicus* contends that the right of choice as to whether or not to conceive and bear a child is also a fundamental constitutional right. Moreover, the statute prohibits a physician from prescribing contraceptives for unmarried persons regardless of his judgment about their health needs. These rights are protected under the Fourteenth Amendment as well as the Fourth, Fifth and Ninth Amendments.

A. The statute impairs the right to life by denying essential health services in violation of the Fourteenth Amendment.

The due process clause of the Fourteenth Amendment expressly protects the individual's right to life against arbitrary government action. The law adopted by Massachusetts places many women at risk of serious injury, and in some cases even death, if they violate the law prohibiting fornication. The penalty for that crime is minor compared with the injury threatened by the statute's denial to the unmarried of medical services in the area of contraception. Clearly, the state could not constitutionally under the Eighth and Fourteenth Amendments impose the death penalty for fornication or render those who fornicate ineligible for public service. Yet, in effect, the Massachusetts statute held unconstitutional by the court below penalizes fornication by putting the unmarried who fornicate at risk of their health or life.

We submit that a state can not isolate lawbreakers from access to essential health services as a means of deterring them from crime. If the state of Massachusetts could deny medical treatment to individuals who violate the law against fornication, then it would seem to follow that the state could also deny other essential life-preserving services as deterrence against other violations of state law. On this basis, Massachusetts could decree that physicians may not treat the unmarried or prescribe for them drugs or devices for the prevention or cure of venereal disease. There is no real difference between such a statute and the one under challenge here which forbids access on the part of the un-

married to physicians and to health services, drugs and devices for contraception. By this statute, the state has created an additional punishment for fornication—a species of punishment abhorrent to a social system which values human life. As Judges Whittemore and Cutter stated in their dissenting opinion in the Supreme Judicial Court of Massachusetts in this case:

> "To say that the legislative purpose is to restrain non-marital intercourse would attribute to the Legislature an intention to use the risk of pregnancy as a deterrent to, or punishment of, such intercourse. To do so would be contrary to the result and reasoning in Commonwealth v. Corbett, 307 Mass. 7, 8-12. See State v. Baird, 50 N.J. 376, 383. * * * the damage caused by an undesired pregnancy to the unmarried parents, to the unwanted child, and to society as a whole, is so disproportionate to any possible benefit as to raise grave constitutional doubts about the validity of such a deterrent if intended."

In *People* v. *Belous*, 71 Cal. 2d 954, 80 Cal. Rptr. 354, 458 P.2d 194 (1969), cert. denied, 397 U.S. 915 (1970), the Supreme Court of California, in considering the constitutionality of that state's restrictive anti-abortion statute, specifically found that if the law (which permitted abortions only where necessary to preserve the life of the woman) was read to require "certainty of death," the statute

> "would work an invalid abridgement of the woman's constitutional rights. The rights involved * * * are the woman's right to life and to choose whether to bear children. The woman's right to life is involved, because childbirth involves risk of death." *Id.* at 963; 80 Cal. Rptr. at 359; 458 P.2d at 199 (1970) (footnotes omitted).

The *Belous* case, it should be noted, specifically involved an abortion performed on an unmarried woman. The principle applied by the California court in *Belous* applies also, we submit, to contraceptive services, which differ from abortion only in that they may be used to prevent a pregnancy threatening to life or health, rather than to terminate pregnancy.

The Massachusetts statute contains no exception permitting doctors to treat an unmarried woman even where pregnancy would be dangerous to her life or health. Moreover, the Massachusetts courts, in cases construing this law before it was amended to permit contraception for married people, held that no exception to protect life or health could be read into the statute. *Commonwealth* v. *Gardner,* 300 Mass. 372, 15 N.E.2d 222, *appeal dismissed,* 305 U.S. 559 (1938). According to the Massachusetts courts, the ban on contraceptives was intended to promote public "morality," and Massachusetts apparently adheres to that view of the law insofar as it still applies to the unmarried.

Thus, it is apparent that Massachusetts has deliberately put its unmarried citizens in the position of forfeiting health and life protecting medical services if they violate the substantially unenforced laws against fornication. We believe that the Fourteenth Amendment precludes any state's taking such action. Thus, this Court stated in its decision in a case sustaining compulsory vaccination:

> "It is easy, for instance, to suppose the case of an adult who is embraced by the mere words of the act, but yet to subject whom to vaccination in a particular condition of health or body would be cruel and inhuman in the last degree. We are not to be understood as holding

that the statute was intended to be applied to such a case, or, if it was so intended, that the judiciary would not be competent to interfere and protect the health and life of the individual concerned." *Jacobson* v. *Massachusetts,* 197 U.S. 11, 38-39 (1905).

B. The right to determine whether or not to procreate is a fundamental right under established constitutional principles.

Many decisions of this Court support the right of an individual to determine whether or not to bring children into the world. Some are grounded upon the constitutional right of privacy; others focus upon individual liberty under the due process clause of the Fourteenth Amendment. All, however, dictate the conclusion which the Court of Appeals reached in this case.

This Court has repeatedly recognized the individual's "indefeasible right of personal security, [and] personal liberty." *Boyd* v. *United States,* 116 U.S. 616, 630 (1886). Indeed, as long ago as 1891, this Court declared that,

> "No right is held more sacred, or is more carefully guarded by the common law, than the right of every individual to the possession and control of his own person, free from all restraint or interference by others, unless by clear and unquestionable authority of law. As well said by *Judge* Cooley, 'The right to one's person may be said to be a right of complete immunity: to be let alone.'" *Union Pac. Ry Co.* v. *Botsford,* 141 U.S. 250, 251 (1891).

In subsequent decisions, this Court has reaffirmed the constitutional right of the individual with respect to procreation. Thus, in *Skinner* v. *Oklahoma,* 316 U.S. 535

(1942), the Court held that an Oklahoma statute which imposed sterilization upon persons convicted two or more times of larceny but not upon similarly situated persons convicted of embezzlement violated the equal protection clause of the Fourteenth Amendment. The Court emphasized that the statute involved "one of the basic civil rights of man," the right of procreation, and as such would be subject to "strict scrutiny." 316 U.S. at 541.

It is true that limitations on the right to control some uses of one's body have been permitted, as for example in *Jacobson* v. *Massachusetts, supra,* in which a compulsory vaccination law was held constitutional. However, in that case, the Court emphasized the necessity of the law in question to avoid "great dangers" and to protect "the safety of the general public." 197 U.S. at 29. Even in that case, the Court noted that there would be exceptions to the compulsory vaccination law where the application of the statute "would be cruel and inhuman." *Id.* at 39. And, while in *Buck* v. *Bell,* 274 U.S. 200 (1927), the Court permitted compulsory sterilization in order to avoid a specific evil, the assumed inevitable birth of congenital imbeciles, the decisions in *Skinner* v. *Oklahoma, supra,* and *Griswold* v. *Connecticut,* 381 U.S. 479 (1965), cast doubt on some aspects of that case, even in the very narrow situation there presented.

More recently, in *Stanley* v. *Georgia,* 394 U.S. 557 (1969), this Court, in holding that a state law that punished the "mere private possession of obscene matter"[1] violated the First and Fourteenth Amendments, explicitly recognized as fundamental "the right to be free, except in very limited

1. 394 U.S. at 559.

circumstances from unwarranted governmental intrusions into one's privacy." 394 U.S. at 564. The Court emphasized that the rights asserted in *Stanley* were the individual's "right to read or observe what he pleases—the right to satisfy his intellectual and emotional needs in the privacy of his own home." 394 U.S. at 565.

In addition to the decision in *Skinner* v. *Oklahoma, supra,* which recognized fundamental rights respecting procreation, this Court has acted on numerous occasions to protect from state interference the rights of the individual in matters relating to marriage, the family and sex. Thus the right to marry,[2] the right to direct the education of one's children,[3] and the right to marital privacy in connection with the use of contraceptives[4] have all been held to be fundamental under the Constitution.

The decision in *Griswold* v. *Connecticut, supra,* is of special importance to evaluation of the issues presented in this case. In *Griswold* five members of the Court based their decision on a right of marital privacy which was found to be within the penumbras of several of the provisions of the Bill of Rights. However, five of the Justices found that the Connecticut law was also invalid under the due process clause of the Fourteenth Amendment since it interfered with fundamental unenumerated rights.[5]

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2. *Loving* v. *Commonwealth,* 388 U.S. 1 (1967).

3. *Pierce* v. *Society of Sisters,* 268 U.S. 510 (1925); *Meyer* v. *Nebraska,* 262 U.S. 390 (1923).

4. *Griswold* v. *Connecticut,* 381 U.S. 479 (1965).

5. See *Griswold* v. *Connecticut,* 381 U.S. at 486-87 (Goldberg, J., Warren, C.J. & Brennan, J., concurring); *id.* at 499-502 (Harlan, J., concurring); *id.* at 502-07 (White, J., concurring).

In addition, Justice Goldberg's opinion in which Chief Justice Warren and Justice Brennan joined, emphasized that the Connecticut law violated the Ninth Amendment.

Many state and lower federal court decisions also support the contentions of *Amicus* that the rights asserted here, i.e., to medical services and to make one's own decisions as to procreation are fundamental. For example, decisions in many of the cases challenging restrictive anti-abortion statutes provide strong support for the Court of Appeals' holding.[6] And it should be borne in mind that even the most restrictive abortion laws permit abortion by physicians to save the life of the patient while the prohibition against contraception for the unmarried in Massachusetts contains no exception whatever.

In *People* v. *Belous, supra,* the California Supreme Court explicitly recognized a woman's fundamental constitutional right to choose whether or not to bear children stating:

> "The fundamental right of the woman to choose whether to bear children follows from the Supreme Court's and this court's repeated acknowledgment of a 'right of privacy' or 'liberty' in matters related to marriage, family, and sex. * * * That such a right is not enumerated in either the United States or California

6. In *United States* v. *Vuitch,* 91 S.Ct. 1294 (1971) this Court upheld the District of Columbia abortion statute as construed against a claim of vagueness and expressly declined to rule on the question of whether the woman has a constitutional right to determine whether or not to bear a child. These questions, however, are scheduled to be argued before this Court in *Doe* v. *Bolton,* 319 F. Supp. 1048 (N.D. Ga. 1970) (per curiam), ques. of juris. postponed to merits, 39 U.S.L.W. 3477 (U.S. May 3, 1971) (No. 971); and *Roe* v. *Wade,* 314 F. Supp. 1217 (N.D. Tex. 1970) (per curiam), ques. of juris. postponed to merits, 39 U.S.L.W. 3477 (U.S. May 3, 1971) (No. 808), during the October 1971 Term.

Constitutions is no impediment to the existence of the right. * * *" 71 Cal.2d at 963-64, 80 Cal. Rptr. at 359-360, 458 P.2d at 199-200 (citations omitted).

Federal and state decisions in a number of other jurisdictions have followed the California Supreme Court and have recognized that abortion is a fundamental right of the same constitutional stature as the rights which were before this Court in *Loving* v. *Commonwealth*, 388 U.S. 1 (1967); *Griswold* v. *Connecticut*, *supra*; *Skinner* v. *Oklahoma*, *supra*; *Pierce* v. *Society of Sisters*, 268 U.S. 510 (1925); and *Meyer* v. *Nebraska*, 262 U.S. 390 (1923). In these cases, state law restrictions on the reasons for which a woman could have an abortion were held unconstitutional. The courts found that such laws interfered with a woman's right to choose whether or not to bear a child. E.g., *Doe* v. *Scott*, 321 F. Supp. 1385 (N.D. Ill.), appeals docketed, *sub nom. Hanrahan* v. *Doe* and *Hefferman* v. *Doe*, 39 U.S.L.W. 3438 (U.S. Mar. 29, 1971) (Nos. 1522, 1523); *Doe* v. *Bolton*, 319 F. Supp. 1048 (N.D. Ga. 1970) (per curiam), ques. of juris. postponed to merits, 39 U.S.L.W. 3477 (U.S. May 3, 1971) (No. 971); *Roe* v. *Wade*, 314 F. Supp. 1217 (N.D. Tex. 1970) (per curiam), ques. of juris. postponed to merits, 39 U.S.L.W. 3477 (U.S. May 3, 1971) (No. 808); *Babbitz* v. *McCann*, 310 F. Supp. 293 (E.D. Wisc. 1970) (per curiam), appeal dismissed, 400 U.S. 1 (1970) (per curiam).[7]

In *Babbitz* v. *McCann*, *supra*, the Court held that

"The police power of the State does not * * * entitle it to deny a woman the basic right reserved to her under

7. *Contra*: *Corkey* v. *Edwards*, 322 F. Supp. 1248 (W.D. N.C. 1971); *Steinberg* v. *Brown*, 321 F. Supp. 741 (W.D. Ohio 1970); *Rosen* v. *Louisiana State Bd. of Medical Examiners*, 318 F. Supp. 1217 (E.D. La. 1970), appeal docketed, 39 U.S.L.W. 3247 (U.S. Nov. 27, 1970) (No. 1010).

> the ninth amendment to decide whether she should carry or reject any embryo which has not yet quickened." 310 F. Supp. at 302.

In *Roe* v. *Wade, supra,* plaintiffs contended "that the Texas Abortion Laws must be declared unconstitutional because they deprive *single women and married couples* of their right, secured by the Ninth Amendment, to choose whether to have children." 314 F. Supp. at 1221 (emphasis supplied). The three-judge court held, "We agree," and said

> "The essence of the interest sought to be protected here is the right of choice over events which, by their character and consequences, bear in a fundamental manner on the privacy of individuals." 314 F. Supp. at 1221.

In *Doe* v. *Bolton, supra,* the Court stated that "the concept of personal liberty embodies a right of privacy which apparently is also broad enough to include the decision to abort a pregnancy,"[8] and ruled that the state could not limit the grounds for the performance of abortion. And in *Doe* v. *Scott, supra,* the three-judge court also held that the Illinois statute unduly infringed the woman's right to privacy.

The rights here involved are of at least the same magnitude as those recognized as fundamental in the cases we have already discussed, i.e., the rights relating to procreation,[9] marriage,[10] education,[11] and the use of contracep-

8. 319 F. Supp. at 1055.

9. *Skinner* v. *Oklahoma,* 316 U.S. 535 (1942).

10. *Loving* v. *Commonwealth,* 388 U.S. 1 (1967).

11. *Pierce* v. *Society of Sisters,* 268 U.S. 510 (1925); *Meyer* v. *Nebraska,* 262 U.S. 390 (1923).

tives.[12] Furthermore, this Court has vindicated other basic constitutional rights such as the right to travel abroad,[13] the right to travel from state to state,[14] and the right of private association, on a parity of reasoning.[15]

Lower courts have also recognized as fundamental rights the right to abortion as discussed above, and the right to control one's appearance,[16] and of course, the Court of Appeals in its decision in the instant case held the right at issue here to be a basic one.

C. The fundamental character of the rights here involved.

Concern for the dignity and privacy of the individual is at the core of the principles which have been established by the previous decisions of this Court referred to above. A corollary of that concern is a recognition that only a compelling need may enable a state to intrude on areas involving essential personal and private matters. Regardless of whether the state has a valid interest in regulating consensual sexual activity, it can have no valid interest in forcing people to have children or in denying them medical services in the area of contraception.

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12. *Griswold* v. *Connecticut*, 381 U.S. 479 (1965).

13. *Aptheker* v. *Secretary of State*, 378 U.S. 500 (1964).

14. *Shapiro* v. *Thompson*, 394 U.S. 618 (1969); *United States* v. *Guest*, 383 U.S. 745 (1966).

15. *NAACP* v. *Button*, 371 U.S. 415 (1963); *Bates* v. *Little Rock*, 361 U.S. 516 (1960).

16. See, e.g., *Breen* v. *Kahl*, 419 F.2d 1034 (7th Cir. 1969), *cert. denied* 398 U.S. 937 (1970); *Richards* v. *Thurston*, 424 F.2d 1281 (1st Cir. 1970).

This Court, we submit, cannot but take judicial notice of the fact that people do engage in extramarital sexual activities.[17] While those who do this may be violating the law, they have not given up their constitutional rights with respect to medical treatment and with respect to having children. These rights of privacy, the exercise of which is proscribed by the Massachusetts statute, are vital to the individual, to possible illegitimate children and to the community in which they live irrespective of the marital status of the individual concerned.

Any civilized society must acknowledge the harm done when individuals are denied access to existing medical techniques and services and are prevented from making decisions vital to themselves and their potential offspring.

Clearly a state must show a "compelling need" before denying individuals access to health care in any area. The risks of pregnancy are greatest, both to the woman and the child, in women under twenty or above thirty-five years of age.[18] The fact that in Massachusetts unmarried women of these ages are only exposed to the risk of pregnancy if they violate the law does not alter the need that exists for health services to protect against serious hazards. As pointed out above people who violate laws against fornication have never been thought to forfeit the right to medical treatment for venereal disease,[19] nor would such forfeiture be consistent with the applicable constitutional guaranties.

17. See note 43, *infra*.

18. See text and accompanying notes *infra* at 21-23.

19. See *Commonwealth* v. *Corbett*, 307 Mass. 7, 29 N.E.2d 151 (1940), See also *Commonwealth* v. *Goldberg*, 316 Mass. 563, 55 N.E.2d 951 (1944); *Commonwealth* v. *Werlinsky*, 307 Mass. 608, 29 N.E.2d 150 (1940).

D. In view of the serious violations of constitutional rights caused by prohibiting the unmarried access to contraceptives, the statute can stand only if Massachusetts demonstrates that it is necessary to promote a compelling state interest.

Since the right to medical treatment and to control fertility are of fundamental constitutional magnitude, Massachusetts bears a heavy burden of justification for the statute's prohibition of the distribution of contraceptives to the unmarried.

Generally, in cases involving a state prohibition of the exercise of fundamental personal rights, the burden of justification to be met by the state is a twofold one: the state must establish that the regulation in question is narrowly drawn, and that it is supported by compelling state interests.

The Attorney General in his brief argues that the burden is upon the appellee to demonstrate "that the statute does not bear a reasonable relationship to a proper object of legislative concern." Brief for Appellant at 10-11. It is clear, however, that the Attorney General in so arguing has ignored the fundamental nature of the rights of unmarried persons that are at issue here and is urging this Court to apply instead the test which is appropriate in cases, such as those involving economic regulation, in which fundamental personal rights are not at issue. The Court of Appeals in its decision from which the state of Massachusetts is appealing quite properly placed the burden of justification upon the state and found that this burden had not been met. See generally 84 *Note,* HARV. L. REV. 1525 (1971).

Bates v. *Little Rock*, 361 U.S. 516 (1960), a case involving the freedom of association, contains a clear statement by this Court of the applicable test in cases such as the instant one:

> "Where there is a significant encroachment upon personal liberty, the State may prevail only upon showing a subordinating interest which is compelling. *National Asso. for Advancement of Colored People* v. *Alabama*, 357 U.S. 449. See also *Jacobson* v. *Massachusetts*, 197 U.S. 11, 49; *Schneider* v. *Irvington*, 308 U.S. 147; *Cox* v. *New Hampshire*, 312 U.S. 569; *Murdock* v. *Pennsylvania*, 319 U.S. 105; *Prince* v. *Massachusetts*, 321 U.S. 158; *Kovacs* v. *Cooper*, 336 U.S. 77." 361 U.S. at 524.

In addition to serving a compelling state interest, a law such as the one here involved must be narrowly drawn. Thus, "a 'governmental purpose to control or prevent activities constitutionally subject to state regulation may not be achieved by means which sweep unnecessarily broadly and thereby invade the area of protected freedom.' *NAACP* v. *Alabama*, 377 U.S. 288, 307." *Griswold* v. *Connecticut*, *supra* at 485.

There can only be two even hypothetical state interests for refusing unmarried people who are sexually active access to contraceptives. Conceivably there could be first, an interest in health on the theory that contraceptives may be harmful to the user and second, the interest (which appears now to be stressed by Massachusetts) in protecting public morals.[20]

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20. Although the Supreme Judicial Court of Massachusetts in *Commonwealth* v. *Baird*, 355 Mass. 746, 247 N.E.2d 574 (1969) did not rest its decision on the marital status of the recipient of the contraceptive substance but rather on the status of the distributor, both questions are necessarily presented in this case. Moreover,

Before examining the particular state interests asserted here, we wish to call the Court's attention to the relevant facts. They demonstrate severe injury to society and to the individuals concerned when children are conceived by the unmarried.

(1) The Nature and Scope of the Problems Presented by Extra-marital Pregnancy

The effects of out-of-wedlock pregnancies and births are disastrous for all concerned.[21] When an unmarried girl or woman becomes pregnant she is faced with a number of alternatives, many of which depend upon her economic status. In some cases, she may marry after conception occurs, and thus an illegitimate birth is prevented. Such forced marriages, often between immature young people, frequently lead to divorce or desertion. If the pregnant woman does not marry, she may, if she has sufficient funds, travel from Massachusetts to another state to obtain a medically safe legal abortion. Of course, if she is young and/or ignorant and/or poor, she may resort to dangerous techniques of self-abortion or may seek the "services" of

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the Massachusetts court, subsequent to the decision of the Supreme Judicial Court of Massachusetts in this case has specifically upheld the ban on prescription and distribution of contraceptives to the unmarried. In *Sturgis* v. *Attorney General*, —— Mass. ——, 260 N.E.2d 687 (1970), which was decided one week before the Court of Appeals handed down its decision in the instant case, the Supreme Judicial Court of Massachusetts in a suit by physicians for declaratory relief upheld the constitutionality of the statute under attack here on the ground that it is a legitimate protection of public health as well as on the "more compelling ground" that it discourages extra-marital relations. *Id.* at ——, 260 N.E.2d at 690.

21. See *Baird* v. *Eisenstadt*, 429 F.2d 1398, 1402 (1st Cir. 1970); *Commonwealth* v. *Baird*, 355 Mass. 746, 758, 759, 247 N.E.2d 574, 581, 582 (1969) (dissenting opinion of Justices Whittemore and Cutter; dissenting opinion of Justice Spiegel).

an unskilled quack abortionist and serious injury or even death may result.

If the woman does not obtain an abortion (legal or illegal), does not marry, and bears the child, the costs to her, to the illegitimate child and to society are incalculable.

For the unmarried mother, the likelihood of becoming a school dropout, economically dependent, poverty stricken and trapped is obvious. One student of these problems has stated:

> "The timing of the first birth is of crucial strategic importance in the lives of young women because the need to take care of a baby limits severely their ability to take advantage of opportunities that might have changed their lives for the better. In this regard, the problems posed by birth to the unmarried woman are especially serious. The girl who has an illegitimate child at the age of sixteen suddenly has ninety percent of her life's script written for her. She will probably drop out of school. * * * She will probably not be able to find a steady job that pays enough to provide for herself and her child, she may feel impelled to marry someone she might not otherwise have chosen. * * * Had she been able to delay the first child, her prospects might have been quite different, assuming that she would have had opportunities to continue her education, improve her vocational skills, find a job. * * *"[22]

In addition, the unavailability of contraception and the occurrence of illegitimate births has marked adverse ef-

22. Campbell, "The Role of Family Planning in the Reduction of Poverty," 30 J. MARRIAGE AND THE FAMILY 236, 245 (1968). See also Sarrel, "The University Hospital and the Teenage Unwed Mother" (mimeo), quoted in Guttmacher, "How Can We Best Combat Illegitimacy?", MEDICAL ASPECTS OF HUMAN SEXUALITY, March, 1969 at 59.

fects upon the health of the unmarried mother and her child. These effects include: a higher death rate for infants born out of wedlock than for infants born in wedlock and a higher proportion of premature births out of wedlock than in wedlock.[23] The higher rates of prematurity and infant mortality in out-of-wedlock births are in turn associated with a lack of prenatal care.[24] A higher maternal death rate has also been associated with out-of-wedlock pregnacies.[25]

The failure of the unwed mother to obtain adequate prenatal care is in turn related to health hazards for the infant. In addition to higher rates of prematurity amongst illegitimate infants,[26] statistics show higher infant mortality rates during the first year for the illegitimate child.[27] Also important because of the frequency with which illegitimate births occur to adolescents, is the direct relation between early childbearing and the risk of particular diseases to offspring[28] and the risk of maternal death.[29]

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23. R. BERNSTEIN & E. HERZOG, "Health Services for the Unmarried Mother," United States Department of Health, Education and Welfare, Welfare Administration (Children's Bureau), 2, 4 (1964).

24. *Id.* at 2, 11. The chief reason for the unmarried pregnant woman's failure to obtain adequate prenatal care is her desire to conceal the pregnancy. *Id* at 12.

25. *Id.* at 4.

26. See R. BERNSTEIN & E. HERZOG, *supra*, note 23 at 4; Anderson, Jenss, Mosher & Richter, "The Medical, Social and Educational Implications of the Increase in Out of Wedlock Births," 56 AM. J. PUB. HEALTH 1868, 1869 (1966).

27. *Id.* at 1870.

28. One study found "significantly elevated risks of intracranial and spinal injury at birth, postnatal asphyxia, atelectasis and club foot among children from very young mothers." Newcombe & Tavendale "Maternal Age & Birth Order Correlations." I MUTATION RESEARCH, 446, 452 (1964). There are also special risks to children born to

Finally, it has been found that child abuse and neglect is a long-range result of unwanted births to women.[30]

The illegitimacy rates in the United States are high and they are increasing.[31] In 1968 the estimated number of

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women who are over 35, including mental deficiency disorders, mongolism, cerebral spastic infantile paralysis, congenital malformations of the circulatory system, intracranial and spinal injury at birth and postnatal asphyxia. *Ibid.*

29. It is also reported that "Generally maternal risk increases with decreasing maternal age below 20, and increases with increasing maternal age above 30." Perkin, "Assessment of Reproductive Risk in Nonpregnant Women," 101 AM. J. OBSTETRICS & GYNECOLOGY 709, 710 (1968).

30. See D. GIL, VIOLENCE AGAINST CHILDREN—PHYSICAL CHILD ABUSE IN THE UNITED STATES (1970). Gil reports that the victims of abuse are often unwanted children who live primarily in households headed by women, that is by women who are unmarried, widowed, divorced or separated. *Id.* at 146. Gil also found that 29 percent of the abused children revealed deviations in social interaction and general functioning, 14 percent suffered from deviations in physical functioning, 8 percent revealed deviations in intellectual functioning, and that over 13 percent of the school age children in a sample of physically abused children attended special classes for retarded children or were in grades below their age level. *Id.* at 107.

31. See Yurdin, "Recent Trends in Illegitimacy—Implications for Practice," 49 CHILD WELFARE 373-375 (1970); Cutright, "Illegitimacy: Myths, Causes and Cures," PERSPECTIVES (Special Feature), January 1971, at 26-27.

The increasing rates of illegitimacy are further documented by Ventura who reports that,

> "All measures of illegitimacy increased over the period from 1940 to 1966. The estimated number of illegitimate births more than tripled from 89,500 to 302,400; the illegitimacy rate rose from 7.1 per 1,000 unmarried women 15 to 44 years of age to 23.4 births per 1,000; and the proportion of illegitimate births to all live births increased from 3.8 to 8.4 percent."

Ventura, "Recent Trends and Differentials in Illegitimacy," 31 J. MARRIAGE AND THE FAMILY 446 (1969). See also, A. CLAGUE & S. VENTURA, TRENDS IN ILLEGITIMACY: UNITED STATES 1940-1965, NATIONAL CENTER FOR HEALTH STATISTICS, VITAL HEALTH STATISTICS, PUBLIC HEALTH SERVICE PUBLICATION No. 1000, SERIES 21 (No. 15) (1968).

illegitimate live births in the United States was 339,200.[32] The bulk of these illegitimate pregnancies occurred in females between the ages of 15 and 24.[33] These figures, however, by no means give a complete picture of the number of out-of-wedlock conceptions that occur, since they fail to take into account the following factors, among others: out-of-wedlock pregnancies that are terminated by legal or illegal induced abortion or by spontaneous miscarriage; out-of-wedlock pregnancies that are successfully concealed; out-of-wedlock pregnancies that result in forced marriages and legitimate births; and out-of-wedlock pregnancies that result in the delivery of still-born infants.

The extent to which premarital conception is not reflected in illegitimate births is revealed in a survey conducted by the National Center for Health Statistics.[34] The

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32. UNITED STATES DEPARTMENT OF HEALTH, EDUCATION AND WELFARE, DIVISION OF VITAL STATISTICS, PUBLIC HEALTH SERVICE, MONTHLY VITAL STATISTICS REPORT—TABLE 10: "Estimated number of illegitimate live births and ratios by age of mother and color—United States [Based on a 50 percent sample of births]" (1968). See also Yurdin, *supra* note 29 at 373-375.

33. The distribution by age of the illegitimate births in 1968 was as follows:

under 15 years	7,700
15 - 17 years	77,900
18 - 19 years	80,100
20 - 24 years	107,900
25 - 29 years	35,200
30 - 34 years	17,200
35 - 39 years	9,700
40 years and over	3,300

UNITED STATES DEPARTMENT OF HEALTH, EDUCATION AND WELFARE, *supra* note 32. YURDIN, *supra* note 31 at 375.

34. UNITED STATES DEPARTMENT OF HEALTH, EDUCATION AND WELFARE, PUBLIC HEALTH SERVICE, NATIONAL CENTER FOR HEALTH STATISTICS, "National Natality Survey," Monthly Vital Statistics Report Volume 18, No. 12 (Supplement 1970) at p. 1 (hereafter "NATIONAL NATALITY STUDY").

report shows that one-third of all first born children in the United States in the years 1964 to 1966 were conceived out of wedlock.[35] Twenty-two percent of all first births occurred less than 8 months after marriage.[36]

This 1964-1966 National Natality Survey made the following finding:

> "If the assumption is made that the first births tabulated as being within eight months of first marriages were indeed premarital conceptions, then the data from the * * * survey indicate that of the average 1,174,000 first births to women aged 15-44 which occurred in the United States each year during 1964-1966, 166,000 or 14 percent were illegitimate and 218,000, or 19 percent were premarital conceptions of legitimate babies.
>
> "Thus, an annual average of 384,000 or 33 percent of the first births during those years were conceived outside marriage."[37]

The study also showed that the proportion of births occurring within 8 months of marriage rose as income fell,[38] and that the highest proportion of births to women married for a period of less than eight months was among those women who had from one to three years of high school.[39]

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35. *Id.* at 2.

36. *Id.* at 1.

37. *Id.* at 3. Some 31% of white and 54% of non-white first births [in Massachusetts] occurring in 1966-1968 were non-maritally conceived, that is, were either born out-of-wedlock or were pre-maritally conceived. MASSACHUSETTS DEPARTMENT OF PUBLIC HEALTH, SUMMARY OF STUDY OF RELATIONSHIP BETWEEN MARRIAGE, CONCEPTION AND FIRST BIRTH IN MASSACHUSETTS WOMEN 4 (1971).

38. NATIONAL NATALITY STUDY at 3 (Table 3).

39. *Id.* at 4 (Table 4).

(2) The interests asserted by Massachusetts are not compelling.

An examination of the asserted interests in health and morals reveals that they do not meet the constitutional standards set forth above.

a. No health purpose is served by this law.

There is obviously no state interest, compelling or otherwise, in preventing unmarried people from using the same contraceptive drugs or devices which the state allows to be disseminated to the married. As the opinion of the Court of Appeals makes abundantly clear, so far as any alleged health purpose is concerned, the statute is arbitrary and capricious. The irrationality of a claimed health purpose is readily apparent. Clearly, any health interest that the state might have in preventing use of contraceptives is unrelated to the marital status of the recipient of the contraceptive article. Any possible adverse side effects of a contraceptive is the same for all users, married or unmarried.

Thus, as the Court of Appeals held, the asserted health basis for the Massachusetts law's discrimination against the unmarried is without any conceivable rational basis.

b. Whatever interest Massachusetts may legitimately have in regulating sexual conduct cannot justify the ban on contraception for the unmarried.

Massachusetts argues that the proscription against distribution of contraceptives to unmarried persons is justified as a means of promoting public morals by deterring fornication and adultery. Brief for Appellant at 14-17. Obviously, adultery, the more serious offense, is not deterred

by this law since married persons have access to contraceptives irrespective of whether or not they engage in illicit relationships.

The Court of Appeals in the instant case found that the statute never had as its purpose the deterrence of fornication. The court's conclusion was based in part on the disparity in penalties for fornication and for violation of the anti-contraception statute, since fornication is a misdemeanor punishable by not more than a thirty-dollar fine or three months in jail,[40] whereas violation of the anti-contraception law is a felony for which the maximum punishment is imprisonment for up to five years in the state prison.[41] The court also relied on the fact that before the statute was amended in 1966, its provisions applied to the married as well as the unmarried. 429 F.2d at 1401. The Court of Appeals thus concluded that:

> "so far as morals are concerned, it is contraceptives per se that are considered immoral—to the extent that *Griswold* will permit such a declaration.
>
> "To say that contraceptives are immoral as such, and are to be forbidden to unmarried persons who will nevertheless persist in having intercourse, means that such persons must risk for themselves an unwanted pregnancy, for the child, illegitimacy, and for society, a possible obligation of support. Such a view of morality is not only the very mirror image of sensible legislation; we consider that it conflicts with fundamental human rights. In the absence of demonstrated harm, we hold it is beyond the competency of the state." 429 F.2d at 1401-02 (citations omitted).

40. MASS. GEN. LAWS ch. 272, §18.

41. MASS. GEN. LAWS ch. 272, §21.

However, even assuming *arguendo* that the Court of Appeals' finding with respect to deterrence of fornication as the purpose of the statute was incorrect, or put another way, that at least today (as opposed to a time prior to the *Griswold* case) the purpose of the statute is to deter fornication, *Amicus* submits that the state's interest in deterring fornication is not sufficiently compelling to justify the extremes adopted in this statute, and that in any event there is no reasonable basis for believing that the stringent measures adopted by Massachusetts have deterred or will deter fornication.

Moreover, the state cannot claim that an interest in deterring fornication justifies creating a situation which leads inevitably to illegal abortion, illegitimacy, unwanted births and serious health hazards.

Although the subject of the validity of "morals" legislation has been long debated,[42] it is not necessary for the decision of the present case to rule on the constitutionality of state laws proscribing fornication and adultery.

Assuming the validity of state laws prohibiting such extra-marital acts, may the state in light of the dubious efficacy of its attempts to prevent such conduct[43] resort to

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42. Compare H. L. A. HART, LAW, LIBERTY, AND MORALITY (1963) with P. DEVLIN, THE ENFORCEMENT OF MORALS (1965). See also Dworkin, "Lord Devlin and the Enforcement of Morals", 75 YALE L. J. 986 (1966); Henkin, "Morals and the Constitution: The Sin of Obscenity", 63 COLUM. L. REV. 391 (1963).

43. In Kinsey's fifteen-year study of sexual behavior of 5,940 white women, it was discovered that nearly 50 percent of the women had had coitus before they were married. A. KINSEY, W. POMEROY, C. MARTIN, & P. GEBHARD, SEXUAL BEHAVIOR IN THE HUMAN FEMALE at 286 (1953). The data show a general trend from prior to

harsh and punitive measures, such as here involved which collide with fundamental individual rights—the right to control fertility.

In our view, any hypothetical deterrent effect of the statute (which effect has not been established by appellant here) is insufficient to justify such a state regulation; it is not necessary to promote a compelling state interest nor, as against today's facts does it have as was pointed out by the court below, any rational basis.

We suggest that this Court's analysis of the issues presented in *Stanley* v. *Georgia, supra,* indicates why the decision of the Court of Appeals should be affirmed.[44] In

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1920 to 1949 of an increase in premarital sexual activity in all age groups. *Id.* at 339 (Table 83).

Studies conducted subsequent to Kinsey's, although smaller in scope, confirm that in the last two decades the trend of increasing premarital sexual intercourse is being maintained. One study of 1,393 college students across the country contained the following observation: "About 27% of Kinsey's college-educated females reported they had experienced coitus by the time they were 21 years old. In contrast, 43% of the 21-year-olds in our United States college sample reported they were coitally experienced. That is an increase of nearly 60%." V. PACKARD, THE SEXUAL WILDERNESS at 161 (1968). See also Bell & Chaskes, "Premarital Sexual Experience Among Coeds—1958 and 1968," 32 J. MARRIAGE AND THE FAMILY 81-84 (1970).

In an earlier study of the sexual behavior of the male population of the United States, it was found that: "In every age group between 16 and 50, more than half (from 70.5% down to 51.3%) of the single males engage in heterosexual intercourse" and that "the highest incidence of premarital intercourse comes in the late teens where nearly three-quarters (70.5%) of the total U.S. population is involved. . . ." A. KINSEY, W. POMEROY & C. MARTIN, SEXUAL BEHAVIOR IN THE HUMAN MALE 249 (1948). It is probable that these figures would be higher today.

44. The recent decisions of this Court in *United States* v. *Thirty-Seven Photographs,* 91 S.Ct. 1414 (1971) and *United States* v. *Reidel,* 91 S.Ct. 1410 (1971), in no way affect the significance of the privacy aspects of *Stanley* v. *Georgia* as they bear upon the instant case.

Stanley, the state claimed the right to bar "the mere possession by the individual in the privacy of his own home"[45] of obscene materials on two grounds. First, the state asserted that exposure to obscene materials may lead to the commission of crimes of sexual violence and to deviant sexual behavior. This Court noted that "[t]here appears to be little empirical basis for that assertion" and emphasized that under the circumstances, "the deterrents ordinarily to be applied to prevent crime are education and punishment for violation of the law." 394 U.S. at 566-67. Second, the state claimed "that prohibition of possession of obscene materials is a necessary incident to statutory schemes prohibiting distribution." 394 U.S. at 567.

The answer of this Court to that argument is specially relevant here:

> "That argument is based on alleged difficulties of proving an intent to distribute or in producing evidence of actual distribution. We are not convinced that such difficulties exist, but even if they did we do not think that they would justify infringement of the individual's right to read or observe what he pleases. *Because that right is so fundamental to our scheme of individual liberty, its restriction may not be justified by the need to ease the administration of otherwise valid criminal laws.* 394 U.S. at 567-68 (citation omitted) (emphasis supplied).

Here, as in *Stanley*, there is scant basis for assuming that forbidding dissemination of contraceptives for the unmarried will have any impact on the sexual mores of the citizen. But even if *some* deterrence of "immoral" con-

45. 394 U.S. at 568.

duct is assumed, the state may take steps against fornication without adopting the essentially totalitarian rule of forcing women to bear illegitimate children if they fail to observe those laws. Massachusetts may not point to "the need to ease the administration of" the fornication laws as the justification for its drastic restriction on the individual's fundamental rights to control conception.

Moreover, in considering whether deterrence of the conduct made criminal by the fornication and adultery statutes may be sought also by prohibiting distribution of contraceptives to the unmarried, it is highly relevant that the conduct sought to be deterred takes place in private with the consent of the individuals concerned and that the harm said to result from such conduct is the generalized disruption or endangering of the moral fabric of society.

It is difficult to see the "compelling" need to supplement the laws against fornication by a means which is more likely than not to result in more illegitimate children and/or in an increase in the illegal abortion rate.

Thus, in the light of these facts and of the limited utility of the anti-contraception law as a deterrent, it strains credulity to be told that the state has a compelling "morals" interest in denying contraceptives to the unmarried. Rather, it seems to be the case that the legislative purpose was to make an unwanted pregnancy the penalty for illicit intercourse. In this connection, we call the Court's attention to the statement made in the concurring opinion in *Baird* v. *New Jersey* by the Chief Justice of New Jersey:

"If it is suggested that the Legislature meant to impede illicit intercourse rather than to illegalize contraception as such, I could not accept that view of the legislative intent. That thesis would assume the legislature intended pregnancy * * * to serve either as a restraint upon illicit affairs or as punishment for them. In my view, the social gain from the deterrence achieved is not worth the tragedy of unwanted pregnancy * * * in the cases in which the statute fails in that purpose; and to prescribe such pregnancy * * * as punishment for illicit intercourse would be a monstrous thing." 50 N.J. 376, 383, 235 A2d 673, 677 (1967) (concurring opinion of Chief Justice Weintraub).

If Massachusetts is truly concerned with deterring fornication and adultery, it can deal with these offenses by means of the statutes which directly proscribe that conduct. Thus, we submit there is no ground for holding that the interest of Massachusetts in deterring fornication by means of denying contraceptives to the unmarried is compelling or indeed even rationally based. Nor can prevention of illicit sexual activity be constitutionally achieved by a regulation whose effect on fundamental rights is as totally destructive of these rights as is this statute.

POINT II

The Massachusetts requirement for a doctor's prescription for all contraceptives disseminated to all users, married or unmarried, is overbroad and violates the fundamental rights of individuals under the Fourth, Fifth, Ninth and Fourteenth Amendments.

The right of all persons, married or unmarried, to have access to contraception is fundamental and protected by the Fourth, Fifth, Ninth and Fourteenth Amendments. *Griswold* v. *Connecticut, supra,* established this for the married; and as we have shown in Point I, this right applies also for the unmarried.

The Massachusetts law mandates a doctor's prescription before any person in Massachusetts may obtain any contraceptive. Yet there are certain types of contraceptives such as condoms, foams and jellies which require no prescription under applicable federal regulation. Massachusetts is, so far as we know, the only state of all 50 which singles out those contraceptives which are generally "non-prescription" and requires that the user obtain them from a doctor.

We submit that there can be no rational justification for such a requirement and that its only purpose is to discourage or inhibit the use of contraception. Such a purpose is constitutionally impermissible. *Cf. Shapiro* v. *Thompson,* 394 U.S. 618 (1969). As the Court of Appeals noted, no health purpose is served by requiring a prescription for this kind of contraceptive. There is no showing whatsoever that Massachusetts has any basis for determining or

has in fact determined that these contraceptives require the intervention of a physician before they can safely be distributed to the public.

The decision of the Court of Appeals that the statute in this aspect is overbroad seems to us unassailable. It is clear that enforcement of this requirement will substantially impair the basic rights of individuals, married or unmarried, and as this Court has held: "a 'governmental purpose to control or prevent activities constitutionally subject to state regulation may not be achieved by means which sweep unnecessarily broadly and thereby invade the area of protected freedom.' *NAACP* v. *Alabama,* 377 U.S. 288, 307." *Griswold* v. *Connecticut, supra* at 485.

An individual who wishes to practice contraception may have no relationship with a private physician—either because of lack of funds or other circumstances—and may live in a geographic area in which there are no health facilities readily available. A requirement that such person obtain a doctor's prescription for any and all contraceptives thus can for all practical purposes foreclose the right to practice contraception. This occurs despite the fact that such person's health needs, as well as his or her personal desires, may make any pregnancy an unwanted or dangerous one, irrespective of marital status.

Massachusetts, in an effort to justify as a "health measure" the burden placed by the state on the distribution of *all* contraceptives, quotes indiscriminately from literature which deals with both prescription and non-prescription articles and substances.[46] As to many of these devices and

46. Brief for Appellant at 11-13.

substances, such as the IUD, the diaphragm, and the birth control pill, no argument is made by anyone against the federal requirement that they be dispensed only on prescription. However, that articles such as condoms, foams, and jellies, like non-contraceptive preparations dispensed without prescription, may cause irritation in some cases and may occasionally, after they are used, require a physician's intervention does not without more provide a basis for any initial requirement that a prescription be obtained. There are few preparations which are without possible adverse effects on some people. Aspirin, for example, has been known to cause serious medical difficulties in some cases, yet no effort has been made by the Massachusetts legislature or anyone else to require prescriptions for such items.

That the medical prescription requirement has no relationship to a health purpose is demonstrated clearly when the situation with respect to the distribution of condoms is considered. No prescription is required in Massachusetts when condoms are bought for the purpose of preventing venereal disease. See *Commonwealth* v. *Corbett*, 307 Mass. 7, 29 NE. 2d 151 (1940). It is irrational to suppose that there is need for a physician's prescription when the purpose for which the condom is to be used to to prevent pregnancy, but not when the purpose is to prevent venereal disease. The same holds true for various products which are sold freely for "feminine hygiene" without a doctor's prescription, but which, if sold for "contraceptive purposes," require such prescription under Massachusetts law.

Since it is obvious that for these and other types of contraceptives there is no possible need for the intervention of a physician, the Massachusetts requirement is arbitrary, capricious and overbroad as well.

POINT III

The Massachusetts statute violates the equal protection clause of the Fourteenth Amendment both in its prohibition of distribution of contraceptives to unmarried persons and in its requirement of a doctor's prescription for all users, both married and unmarried.

A. The Massachusetts law discriminates invidiously against the poor.

In *Griswold* v. *Connecticut, supra,* Mr. Justice White in his concurring opinion observed:

> "[T]he clear effect of these statutes as enforced, is to deny disadvantaged citizens of Connecticut, those without either adequate knowledge or resources to obtain private counseling, access to medical assistance and up to date information in respect to proper methods of birth control. * * * In my view, a statute with these effects bears a substantial burden of justification when attacked under the Fourteenth Amendment. * * *" 381 U.S. at 503 (citations omitted).

That statement is equally applicable to the impact of the Massachusetts law on the poor. This impact is a twofold one. In the first place, since the law requires a doctor's prescription for all contraceptives, poor women irrespective of their marital status are faced with an often insurmountable obstacle to access to contraception because they are unable to obtain a physician's services. Second, insofar as the law permits contraceptive services for the married, it unequally burdens the married poor in its operation. This Court can take judicial notice of the unequal distribu-

tion of health services which exists throughout the United States and of the effect that the inadequate number of doctors available to service the public has upon the availability of direct physician service to the poor. The fact that medical service is not readily available to the poor is demonstrated in the context of fertility control in a recent report of the Senate Committee for Labor and Public Welfare which states:

> "Problems of unwanted children do not occur only in low income and less educated families in this country, but the consequences are greater in this group because of the accumulation of difficulties this condition imposes upon the poor. * * *
>
> * * * Medically indigent families (defined according to poverty levels established by the Social Security Administration) have an average annual fertility rate 53 percent higher than the non-poor. The couple with funds to purchase health care has relatively easy access to family planning services. The medically indigent couple—usually dependent on public and voluntary agencies for health care—is forced to do without, or to rely heavily on the least effective non-medical techniques for fertility control unless they happen to reside in an area where family planning services are made readily available by public health services or voluntary agencies.
>
> A number of studies have established the existence of a group totalling about 5 million medically indigent women in the United States of child-bearing age having a need for subsidized family planning services." Sen. Rep. No. 91-1004, 91st Cong., 2d Sess. 9 (1970) (footnote omitted).

Moreover, the prohibition against dissemination of contraceptives to the unmarried also discriminates against poor

unmarried people. The middle class or wealthy woman who is unmarried can easily go out of state for contraceptive services. It seems likely that she is also in a position to persuade her private physician to provide the needed prescriptions and/or service. But the poor cannot do this.

The impact of this law—both with respect to the requirement for a doctor's prescription and with respect to restricting contraceptives to married persons—is thus grossly discriminatory in its impact on poor people.

It is immaterial whether or not this discrimination results from a conscious state policy, for the state has consciously adopted a statute which inexorably leads to discrimination against the indigent. Accordingly, under the principles which this Court applied in *Griffin* v. *Illinois*, 351 U.S. 12 (1956); *Douglas* v. *California*, 372 U.S. 353 (1963), and *Harper* v. *Virginia Bd. of Elections*, 383 U.S. 663 (1966), the Massachusetts law violates the equal protection clause of the Fourteenth Amendment.

B. The law discriminates against women as opposed to men who violate the laws against fornication.

Not unlike the situation before this Court in *Skinner* v. *Oklahoma, supra*, the impact of this law falls unequally on those similarly situated. It imposes a harsh penalty on women who violate the laws against fornication by putting them at risk of unwanted pregnancy, health hazards and the birth of illegitimate children, yet their male partners, equally guilty of fornication, are not burdened by forced conception in any comparable manner.

The Massachusetts law, as we have discussed above in Point I, *supra,* impinges on fundamental constitutional rights. Thus, under *Skinner* it is subject to at least "strict scrutiny," if not to the requirement enunciated by this Court in *Shapiro* v. *Thompson, supra,* that it must be shown to be necessary to promote a compelling governmental interest.

Even if the less stringent test of equal protection—that applicable to other than "fundamental" rights—were considered, *Amicus* contends that there is no reasonable basis for this result in terms of the state's alleged justification of the law, deterrence of fornication, since the state can, as indicated above, proceed directly against all who engage in fornication without invidiously singling out one category for extremely harsh treatment, indeed treatment which amounts to exposing women to a double penalty.

Conclusion

We submit that under the principles of past cases decided by this Court, the Massachusetts statute unconstitutionally interferes with fundamental individual rights and that no compelling need or rational justification can be urged for the prohibition against contraceptive services to the unmarried and the absolute denial to them of medical services in the area of contraception. In addition, the requirement that all contraceptives for married persons be prescribed by a physician is arbitrary and discriminatory as well as overbroad.

For all of the reasons stated in this brief *Amicus* respectfully urges that the judgment of the Court of Appeals declaring the Massachusetts anti-contraception law unconstitutional be affirmed in all respects.

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Respectfully submitted,

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